IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	
Mark NEWBY, Plaintiff, v. ENRON CORP., et al., Defendants.	Civil Action No. H-01-3624 (Consolidated)
This Document Relates to: JACOB BLAZ, On Behalf of Himself and All Others Similarly Situated, Plaintiff, - against - ROBERT A. BELFER et al. Defendants.	Civil Action No. H-02-1150

ARTHUR ANDERSEN LLP'S RESPONSE
TO *BLAZ* PLAINTIFF'S MOTION FOR REMAND

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Defendant Arthur Andersen LLP respectfully submits this memorandum of law in opposition to plaintiff's Motion to Remand. For the reasons set forth below, plaintiff's motion should be denied.

Plaintiff's principal argument in favor of remand is that applying the Securities Litigation Uniform Standards Act of 1998 ("SLUSA" or the "Act") to this action would entail an impermissible retroactive application of that Act.[1] This argument rests on two faulty premises. First, it erroneously assumes that SLUSA has affected plaintiff's substantive rights. But SLUSA merely prohibits plaintiff from pursuing a class action while preserving his ability to pursue an individual action under state law. It did not affect plaintiff's substantive rights, and it left him free to pursue state law claims. Because SLUSA is thus purely procedural, there is no impediment to applying the Act to actions – like plaintiff's – that were filed after the statute's enactment.

Second, plaintiff's argument mistakenly concludes that applying SLUSA to his motion for remand would entail a retroactive application of that statute to pre-enactment conduct. SLUSA regulates litigation, not underlying conduct. Thus, applying the Act to cases – like the case at bar – filed after its November 3, 1998 enactment constitutes prospective, not retroactive, application of the statute.

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[1]Plaintiff concedes that his action "is a 'covered class action' as defined by SLUSA," so applying SLUSA would subject the class action to "removal and automatic dismissal." Memorandum of Law in Support of Plaintiff's Motion for Remand ("Pl. Mem."), at 19.

I.

SLUSA APPLIES PROSPECTIVELY TO
ALL ACTIONS FILED AFTER ITS ENACTMENT[2]

A. Because SLUSA Does Not Affect Plaintiff's Substantive Rights, the Statute Properly Applies to Actions Filed After Its Enactment

As plaintiff concedes, SLUSA's prohibition on certain class actions, see 15 U.S.C. § 77p(b), does not bar him from bringing an individual action raising state law claims in state court. (Pl. Mem. at 20 n.7). Thus, SLUSA does not prevent plaintiff from pursuing his state law claims against defendants, but only affects plaintiff's choice of pursuing his claims as a class action rather than as an individual action.

Whether or not an action can be maintained as a class action is purely a procedural issue. In the federal courts, this issue is governed by Rule 23 of the Federal Rules of Civil Procedure, promulgated by the U.S. Supreme Court under the Rules Enabling Act, which expressly provides that the Federal Rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072; see also, e.g., Johnson v. West Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000) (right to proceed as a class action "is merely a procedural one"); Beamon v. Brown, 125 F.3d 965, 969 (6th Cir. 1997) (class action "is merely a convenient procedural device") (internal quotations omitted); Berry v. Pierce, 98 F.R.D. 237, 244 (E.D. Tex. 1983) (class action "is merely a procedural device"). Class action status is likewise a procedural issue under Texas law. See,

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[2]Plaintiff relies on the two-step analysis set forth in Landgraf v. USI Film Prods., 511 U.S. 244 (1994). As demonstrated below, however, the normal rules of statutory interpretation indicate that SLUSA applies only to future cases, which removes the possibility of retroactive application. See Lindh v. Murphy, 521 U.S. 320, 325 (1997); Mathews v. Kidder, Peabody & Co., 161 F.3d 156, 160-61 (3d Cir. 1998)) ("Absent a clear statement from Congress, we must use normal statutory construction rules to determine if Congress manifested an intent to only apply a statute to future cases.").

e.g., Southwestern Ref. Co. v. Bernal, 22 S.W.2d 425, 437 (Tex. 2000) ("The class action is a procedural device . . . not meant to alter . . . the substantive prerequisites to recovery under a given tort.").[3]

Similarly, SLUSA's removal provision implicates only jurisdiction and procedure, not plaintiff's substantive rights. See, e.g., State of Nebraska ex. rel. Dep't of Soc. Servs. v. Bentson, 146 F.3d 676, 678 (9th Cir. 1998) (removal statute "regulates jurisdiction and procedure" and therefore may be applied "to cases pending at the time of its enactment"); see also Hughes Aircraft Co. v. United States, 520 U.S. 939, 951 (1997) ("Statutes merely addressing which court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties."); Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) ("Application of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case. Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties.").[4]

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[3]W.R. Huff Asset Mgmt. Co. v. BT Sec. Corp., 190 F. Supp. 2d 1273 (N.D. Ala. 2001) – a case on which plaintiff heavily relies – is distinguishable because in that case the court found that the plaintiff was the "conduit for the defendants' [alleged] fraud on [the plaintiff's] clients" and that it was the plaintiff's assertion of claims on behalf of these clients that qualified the lawsuit as a "covered class action" as defined by SLUSA. See id. at 1279-80. These unique circumstances are not present in the case at bar, in which plaintiff asserts claims on behalf of a generic alleged class of "all purchasers of the publicly traded securities of Enron during the period from April 11, 1997 to October 15, 1998." Petition at 12.

[4]In contrast to SLUSA, the Private Securities Litigation Reform Act's elimination of securities fraud as a RICO predicate is substantive. See, e.g., Scott v. Boos, 215 F.3d 940, 945 (9th Cir. 2000) ("the relevant intent of the PSLRA . . . was substantive – to deprive plaintiffs of the right to bring securities fraud based RICO claims"); Mathews, 161 F.3d at 164 ("focus was clearly on the substance of claims such as the present one and on completely eliminating the so-called 'treble damages blunderbuss of RICO' in securities fraud cases") (citation omitted).

Because "[n]o one has a vested right in any given mode of procedure," Ex parte Collett, 337 U.S. 55, 71 (1949), procedural statutes are generally applied not only to cases filed after the statute's enactment, but also to pending cases. See, e.g., id. (applying federal transfer statute, 28 U.S.C. § 1404(a), to pending case); see also Landgraf, 511 U.S. at 280 ("The jury trial right set out in § 102(c)(1) is plainly a procedural change that would ordinarily govern in trials conducted after its effective date."); Vela v. City of Houston, 276 F.3d 659, 673 (5th Cir. 2001) ("Although in many situations a court should apply the law in effect at the time it renders its decision, those situations generally involve procedural changes to existing law, including statutes which merely alter jurisdiction.") (citations omitted); Long v. Simmons, 77 F.3d 878, 879 (5th Cir. 1996) ("Amendments to the Federal Rules of Civil Procedure should be given retroactive application to the maximum extent possible.") (citation omitted); Shipes v. Trinity Indus., 31 F.3d 347, 349 (5th Cir. 1994) ("procedural changes usually should be applied to pending cases"). Moreover, because of "the diminished reliance interests in matters of procedure," "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." Landgraf, 511 U.S. at 275.

Indeed, the "natural expectation" that a purely procedural statute like SLUSA "would apply to pending cases," Lindh v. Murphy, 521 U.S. 320, 327 (1997), explains why SLUSA expressly provides that it "shall not affect or apply to any action commenced before and pending on the date of enactment of this Act." 15 U.S.C. § 77p note. If, as plaintiff contends, well-established principles against retroactivity barred SLUSA's application to pending cases, this provision would be mere surplusage. See, e.g., North Star Steel Co. v. Crown Cork & Seal Co., 515 U.S. 29, 34 (1995) ("it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with our precedents and that it expects its enactments to be interpreted in

conformity with them") (punctuation omitted). As the Supreme Court has explained, its "cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." See, e.g., Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990). To avoid rendering SLUSA's "applicability" provision superfluous, SLUSA should be interpreted to apply prospectively to all actions filed after its enactment. See Lindh, 521 U.S. at 325 ("In determining whether a statute's terms would produce a retroactive effect . . . and in determining a statute's temporal reach generally, our normal rules of construction apply.").[5]

B. Because SLUSA Regulates Litigation, Not Underlying Conduct, Its Application to Post-Enactment Litigation Is Prospective

1. Applying a Statute Regulating Litigation to Subsequently Filed Cases Does Not Implicate Retroactivity

The Supreme Court's decision in Lindh v. Murphy, 521 U.S. 320 (1997), demonstrates that applying a statute regulating litigation – as opposed to underlying conduct – "only to such cases as were filed after the statute's enactment" constitutes a prospective application. Lindh involved amendments to the chapter of the federal habeas corpus statute "governing all habeas corpus proceedings in the federal courts." Id. at 326. Thus, like SLUSA, these amendments governed litigation, not underlying conduct.[6] The Court's determination of the amendments' temporal reach rested on a "negative implication" from a concurrent amendment adding another

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[5]Although "the mere fact that a new rule is procedural does not mean that it applies to every pending case," Landgraf, 511 U.S. at 275 n.29 (emphases added), the procedural nature of SLUSA plus analysis of its text demonstrate that the Act applies prospectively to post-enactment cases.

[6]Unlike SLUSA, these amendments were not merely procedural, but instead "govern[ed] standards affecting entitlement to relief." Id. at 329.

chapter to the habeas statute, applicable only to capital cases. In particular, the Court focused on a new provision stating that the chapter on capital cases "shall apply to cases pending on or after the date of enactment of this Act." Id. at 327. The Court reasoned that this provision indicated that the amendments to the chapter governing all habeas proceedings applied "to the general run of habeas cases only when those cases had been filed after the date of the Act." Id. Significantly, the Court unanimously agreed that these amendments applied to cases filed after their enactment. See id. at 336 (holding that amendments apply "only to cases filed after the Act became effective"); id. at 344-45 (Rehnquist, C.J., dissenting) (amendments should be applied not only to post-enactment cases but also to pending cases). The Lindh Court's reasoning demonstrates that a "negative implication" of statutory text is a sufficient basis for concluding that Congress intended a statute governing litigation to apply only to future cases.

2. Removal of Plaintiff's Action Does Not Entail Retroactive Application of SLUSA

Applying SLUSA to this action does not entail a "retroactive" application of the Act. Plaintiff's contrary argument relies on the mistaken premise that the conduct regulated by SLUSA is defendants' alleged actions in connection with the sale of securities prior to November 3, 1998, rather than plaintiff's filing of his lawsuit after November 3, 1998.

As reflected in the title of the statute, the conduct regulated by the Securities Litigation Uniform Standards Act is the maintenance of litigation. SLUSA's central provisions are directed at the conduct of plaintiffs in making allegations and pursuing lawsuits and at the lawsuits themselves, and are completely silent with respect to the actual (as opposed to alleged) conduct of defendants:

"(b) CLASS ACTION LIMITATIONS. – No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

"(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

"(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

"(c) REMOVAL OF COVERED CLASS ACTIONS. – Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)."

15 U.S.C. § 77p(b)-(c) (emphases added). The "private part[ies]" subject to SLUSA are plaintiffs, not defendants. Thus, by its express terms, SLUSA regulates plaintiff's conduct, not defendants' conduct.[7]

In this context, applying SLUSA to plaintiff's action – which was filed after SLUSA was enacted – entails a prospective application of the Act. See In re BankAmerica Corp. Sec. Litig., 95 F. Supp. 2d 1044, 1046 n.2 (E.D. Miss. 2000) (SLUSA "is not retroactive and does not apply to suits filed prior to November 3, 1998, the effective date of the Act"), aff'd, 263 F.3d 795 (8th Cir. 2001); see also Martin v. Hadix, 527 U.S. 343, 355 (1999) ("Respondents . . . contend that the [Prison Litigation Reform Act] reveals congressional intent that the fees provisions apply prospectively only. That is, respondents insist that the PLRA's fees provisions demonstrate that they apply only to cases filed after the effective date of the Act."); Fujisawa Pharm. Co. v. Kapoor, 115 F.3d 1332, 1337 (7th Cir. 1997) (Posner, C.J.) (under Private Securities Litigation

[7]In Huff, the court incorrectly assumed that the conduct relevant to the retroactivity analysis was the defendants' conduct. See 190 F. Supp. 2d at 1276. This fundamental error undermines the rationale for the court's decision.

Reform Act's elimination of securities fraud as a RICO predicate, it is "only in cases . . . that were pending on the date [of the PSLRA's enactment] that the right to maintain a RICO claim [predicated on securities fraud] is preserved"); United States v. Rocha, 109 F.3d 225, 229 (5th Cir. 1997) (Antiterrorism and Effective Death Penalty Act's certificate of appealability "requirement does not apply retroactively to § 2255 appeals in which the final judgment and notice of appeal were entered before the AEDPA's effective date").

In the subsection that addresses the statute's temporal applicability, SLUSA states:

> "APPLICABILITY. – The amendments made by this section [which include the bar on certain class actions and the removal provision] shall not affect or apply to any action commenced before and pending on the date of enactment of this Act."

15 U.S.C. § 77p note. This language clearly implies that SLUSA applies to actions commenced after the date it was enacted. Moreover, as explained above, Lindh demonstrates that such a "negative implication" is a sufficient basis for concluding that a statute applies to cases filed after its enactment. See Lindh, 521 U.S. at 327.

C. Policy Considerations Do Not, and Cannot, Compel Remand

Plaintiff argues that this case should be remanded because state law claims provide the "Class' only opportunity to remedy Defendants' rampant fraud." (Pl. Mem. at 16). But this argument ignores plaintiff's concession that "SLUSA would not bar Class Members from bringing individual actions in state court." (Pl. Mem. at 20 n.7). The fact that plaintiff's action is now subject to dismissal under SLUSA results from his own choice to bring a class action rather than an individual action. To paraphrase the Huff court, "[i]f this is a conundrum, it is one of [plaintiff's] making and not one [Congress or] this court made up." 190 F. Supp. 2d at 1278. Moreover, because no class has been certified, the dismissal will not bind the absent members of

the purported class, who remain free to bring individual state law actions. Thus, it is simply not true – as plaintiff asserts – that if his motion to remand is denied, "the Class would thus be precluded from seeking any relief in any forum." (Pl. Mem. at 19 (emphasis added)).

In any event, the fact that plaintiff is barred by SLUSA from bringing a class action – but not an individual action – and is barred by the three-year statute of repose from bringing a federal securities claim is not some sort of statutory oversight crying out for a judicial remedy.[8] Rather it is the intended result of a deliberate legislative decision that should not – and cannot – be judicially undone. This Court should presume that when Congress extinguished plaintiffs' rights to bring certain state law claims as class actions, it was aware of the three-year statute of repose applicable to the Securities Exchange Act of 1934 that SLUSA amended. See Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). A plaintiff who purchases a security today is in the same position as Blaz – she must bring any federal securities claim within three years, or she will be left only with state law claims that can be asserted in an individual action – and no ruling on SLUSA's retroactivity will change her position.

II.

PLAINTIFF'S RIGHT TO PROCEDURAL
DUE PROCESS HAS NOT BEEN VIOLATED

Plaintiff argues that SLUSA's extinguishment of his right to pursue a class action – as opposed to an individual action – denied him procedural due process. (Pl. Mem. at 22-23). Even

[8]The Huff court's conclusion that, in light of the effect of the periods of repose and limitation under the federal securities laws, applying SLUSA to the action at issue would "shoc[k] the conscience of this court" is difficult to reconcile with the fact that the first time the Huff court considered the issue, it concluded that SLUSA did apply. See Huff, 190 F. Supp. 2d at 1274-75 (explaining that court was reconsidering the remand issue after initially denied motion to remand).

if SLUSA had extinguished a substantive right of plaintiff's – and it did not – his procedural due process argument is meritless. "The Supreme Court long ago established that, when a legislature extinguishes a property interest via legislation that affects a general class of people, the legislative process provides all the process that is due." McMurtray v. Holladay, 11 F.3d 499, 504 (5th Cir. 1993) (citing Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (Holmes, J.)).

Plaintiff's reliance on Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) is entirely misplaced. In Brinkerhoff, the plaintiff asserted that a local tax assessment violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. See 281 U.S. at 674-75. The Supreme Court of Missouri denied equitable relief, reasoning that there was an adequate legal remedy of complaining to the tax commission, and that the plaintiff was guilty of laches for not pursuing this remedy. See id. at 675. The court thus overruled its prior ruling that it was "preposterous" and "unthinkable" that the commission had statutory authority to hear such complaints, and that any such authority would violate the Missouri Constitution. Id. at 676. Because this prior ruling had been "consistently acted upon by the commission," id., the U.S. Supreme Court reasoned that "at no time did the state provide to the plaintiff an administrative remedy against the alleged illegal tax; and in invoking the appropriate judicial remedy, the plaintiff did not omit to comply with any existing condition precedent." Id. at 679. Under these circumstances, the U.S. Supreme Court concluded that the Missouri courts had denied plaintiff any "opportunity to present its case and be heard in support." Id. at 681. This deprived the plaintiff of the procedural due process guaranteed by the federal constitution because "a state may not deprive a person of all existing remedies for the enforcement of a right, which the state

has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." Id. at 682 (emphasis added).

Brinkerhoff is distinguishable in two fundamental respects. First, SLUSA did not deprive Blaz "of all existing remedies" for the enforcement of his state law claims; rather, it merely deprived him of the option to bring his claims in a purported class action. Second, Congress was not powerless to modify Blaz's substantive rights under state law (had Congress so intended), whereas Missouri had no power to modify, much less destroy, the Brinkerhoff plaintiff's federal equal protection rights. In light of these differences, Brinkerhoff is utterly unavailing to Blaz.

CONCLUSION

For these reasons, plaintiff's Motion for Remand should be denied.

Dated: Houston, Texas
May 15, 2002

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2002, the foregoing pleading was served pursuant to the Court's April 5, 2002 Order.

Andrew Ramzel